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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

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LIST REQUIRED BY RULE 28.1

The list required by Rule 28.1 may be found in MCI's August 17, 1984, Brief In Opposition to the petition for certiorari filed by the National Association of Regulatory Utility Commissioners, No. 84-95.

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BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

Pursuant to Rule 22.1 of the Rules of this Court, respondent MCI Telecommunications Corporation ("MCI") opposes the petitions for certiorari filed by the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission, No. 84-816; the Florida Public Service Commission, No. 84-824; and the New York Public Service Commission, No. 84-856.

LIMITED PURPOSE OF THIS OPPOSITION

The petitions for certiorari in Nos. 84-816, 84-824 and 84-856 seek review of the D.C. Circuit's decision to uphold the FCC's end-user access charge plan. Many of the issues raised by the instant petitions were previously raised by the petitions filed in Nos. 84-95 *(National Association of Regulatory Utility Commissioners v. FCC)* and 84-504 *(National Association of Utility Consumer Advocates, et al. v. FCC)*. MCI opposed those earlier petitions in a Brief in Opposition filed on August 17, 1984 in No. 84-95.[1] MCI relies on the statement of the case and the argument made in that brief to oppose the instant petitions. Petitioners Wisconsin (No. 84-816) and New York (No. 84-856), however, have raised a new issue concerning the authority of the FCC to prescribe end-user access charges for "connecting carriers." This brief in opposition is directed to that issue.

STATEMENT OF THE CASE

MCI adopts the statement of the case presented in its Brief in Opposition, filed on August 17, 1984, in No. 84-95, *National Association of Regulatory Utility Commissioners v. Federal Communications Commission and United States of America, et al.*

SUMMARY OF THE ARGUMENT

There is no difference between the Commission's authority to order end-user charges for connecting carriers and its authority to order such charges for other carriers. Both connecting and non-connecting carriers are expressly subject to Section 205 of the Communications Act which provides ample authority to prescribe end-user charges.

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[1] MCI also relied upon that brief in opposing the petition filed in No. 84-504.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO PRESCRIBE END-USER CHARGES FOR CONNECTING CARRIERS

The Commission decided that all exchange telephone companies should use end-user charges to recover a substantial portion of the costs of non-traffic sensitive subscriber equipment allocated to the interstate jurisdiction. Petitioners allege that some exchange telephone companies are "connecting carriers" under the Communications Act[2] and that the Commission lacks authority to order such carriers to utilize end-user charges. The attempted distinction between end-user charges for connecting carriers and other carriers lacks merit. While "connecting carriers" are exempt from some of the provisions of the Communications Act, they are nevertheless expressly subject to the very provisions upon which the agency relied to order end-user charges.

Pursuant to Section 2(b) of the Act, 47 U.S.C. § 152(b), connecting carriers are expressly made subject to Sections 201 through 205, 47 U.S.C. §§ 201-205.[3] These sections generally provide that carriers shall furnish service upon reasonable request and that their charges and practices will be just and reasonable (Sec. 201); that it

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[2] "Connecting carriers" are carriers that are engaged in interstate or foreign communication solely through physical connection with the facilities of another unrelated carrier. *See* Sections 2(b) and 3(u) of the Communications Act, 47 U.S.C. §§ 152(b) and 153(u).

[3] Section 2(b), 47 U.S.C. § 152(b), states:

> ". . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . *except that sections 201 through 205 of this Act, both inclusive, shall except as otherwise provided therein, apply to carriers described in clauses (2), (3) and (4).*" (emphasis supplied)

shall be unlawful for any carrier to make unreasonable discrimination in charges (Sec. 202); that every carrier, except connecting carriers, shall file tariffs (Sec. 203); that the Commission may hold hearings upon the lawfulness of charges and practices (Sec. 204); and that the Commission after full opportunity for hearing may prescribe just and reasonable charges, classifications, regulations and practices. The Commission relied upon these sections of the Act, especially Section 205, to prescribe the end-user charges here at issue. *MTS and WATS Market Structure*, 93 FCC 2d 241, 254 *et seq.* (1983). Accordingly, the Commission's authority to prescribe end-user charges for connecting carriers under Section 205 of the Act stands on the same footing as the agency's authority to prescribe end-user charges for any other carrier. Because it could prescribe the use of such charges for non-connecting carriers,[4] it could also prescribe such charges for connecting carriers.

The only possibly arguable limitation upon the Commission's authority to prescribe end-user charges for connecting carriers is that Section 203 does not require that connecting carriers file tariffs with the Commission as it does for other carriers.[5] But Section 203 also does not prohibit the filing of tariffs by connecting carriers. It merely does not, of itself, mandate such filing. Section 203 envisions that the charges of connecting carriers for

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[4] *See* MCI's October 17, 1984, Brief in Opposition, filed in *NARUC v. FCC*, No. 84-95.

[5] Wisconsin asserts that connecting carriers are not subject to Section 201(a), citing *United Tel. Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977). That case, however, holds exactly the opposite. As stated by the court, Section 201 is inapplicable only if a carrier removes its interconnection with an interstate company and thereby removes itself from the connecting carrier class: "United and Carolina are free to remove their interconnection with Southern Bell and thereby also remove themselves completely from the jurisdiction of the Commission." 559 F.2d at 724. No telephone company carriers have chosen to remove their interconnection with the interstate network in this case.

interstate communications will be reflected in the tariffs of other carriers. As the court below stated, "[N]othing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205." 737 F.2d at 1115, n. 23. Even if the Commission's authority under Section 203 were somehow limited by Section 203's connecting carrier exception, its authority under Section 205 to prescribe rates is not limited, and it is that section under which the substantive requirements of the agency decision were ordered. Section 205 explicitly authorizes the prescription of charges, classifications, regulations and practices for all carriers. The incorporation of these substantive prescriptions into the vehicle of a tariff is a derivative matter, falling within the agency's general authority to conduct its business according to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). The Commission's authority to require connecting carriers to file access tariffs under Section 4(i), 47 U.S.C. § 154(i)—in spite of the language in Section 203—is well established. *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981). Moreover, in the decision below, the Commission left "connecting carriers," if any exist, with options other than the filing of tariffs of their own.[6]

Not only are petitioner's arguments without basis in law, they rest upon a factual premise not established below. Neither the agency, nor the court below, addressed the issue of what carriers, *if any*, are connecting carriers in view of the emerging competition in the telecommunications industry. *Compare Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939) (reviewing Commission's finding concerning connecting carrier status after

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[6] The FCC provided that, through a tariff pooling arrangement, carriers could file common tariffs. 93 FCC 2d 325-333. In this way, the rates of connecting carriers would not necessarily be reflected in tariffs of their own, but in tariffs filed together with carriers not classified as connecting carriers.

full hearing before the Commission). Moreover, the accuracy of petitioner's premise is certainly not apparent.[7] Until the agency determines what carriers, if any, may be properly classified as "connecting carriers" in the aftermath of the divestiture of AT&T, the issue raised by petitioners lacks a firm foundation in fact and thus is purely hypothetical and therefore should not be reviewed by the Court. *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974).

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[7] Local exchange telephone companies are now engaged in interstate communications through the offering of interstate access service. The vast array of interstate access services, which the local carriers offer, directly and significantly affect the quality and the type of interstate communication that can be transmitted and makes those carriers active and integral parts of the interstate network. Moreover, the physical connections in question are not solely connections with carriers, as required in Section 152(b) to qualify for classification as connecting carriers, but are also connections with private companies with their own private interstate facilities and networks not offered for public use. 737 F.2d at 1131.

Not only are heretofore local companies actively engaging in interstate communication through the offering of interstate access services, they are also actively operating interstate networks. GTE, which owns local telephone companies throughout the country, purchased the facilities of Southern Pacific Communications Corporation, and is the third largest interstate common carrier. *Application of GTE and SPCC and SPSC*, 94 FCC 2d 235 (1983). United Telephone Company, an owner of local exchange companies, has purchased U.S. Telephone, Inc. and now operates interstate circuits. *United Telecommunications, Inc. and U.S. Telephone, Inc.*, 56 Rad. Reg. 2d (P&F) 574 (1984). Any number of other local telephone companies have become interstate resellers by leasing the lines of other carriers. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 FCC 2d 554 (1983). The number of such companies cannot be determined because the FCC requires neither certificates of convenience and necessity nor tariffs for such resellers. *Id.* Even the BOCs own and operate some interstate circuits under the exceptions to the MFJ permitted by the U.S. District Court. *U.S. v. Western Electric Co.*, 569 F. Supp. 1057, 1100, 1107 (D.D.C. 1983).

CONCLUSION

For the reasons set forth above, and in MCI's August 17, 1984 Brief filed in No. 84-95, MCI respectfully requests that the petitions for certiorari in Nos. 84-816, 84-824, and 84-856 be denied.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

The text of Section 2(b) and Sections 201-205 of the Communications Act, 47 U.S.C. §§ 152(b), 201-205, may be found in the appendix of the petition for certiorari in No. 84-856. The text of Section 3(u) of the Communications Act, 47 U.S.C. § 153(u) may be found in the appendix of the petition for certiorari in No. 84-816.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i) states:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.